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Discrimination or Differential Involvement? A Review of the Research Exploring the Impact of Indigenous Status on Sentencing

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Abstract

Existing court data suggest that adult Indigenous offenders are more likely than non-Indigenous defendants to be sentenced to prison but once imprisoned generally receive shorter terms. Using findings from international and Australian multivariate statistical analyses, this paper reviews the three key hypotheses advanced as plausible explanations for these differences: 1) differential involvement, 2) negative discrimination, 3) positive discrimination. Overall, prior research shows strong support for the differential involvement thesis, some support for positive discrimination and little foundation for negative discrimination in the sentencing of Indigenous defendants. Where discrimination is found, we argue that this may be explained by the lack of a more complete set of control variables in researchers' multivariate models.

Keywords: Indigenous offenders, sentencing, discrimination, differential involvement, focal concerns.

Introduction

Existing court data show an initial baseline difference between the sentencing outcomes of adult Indigenous offenders compared to non-Indigenous defendants. Indigenous offenders are more likely to be sentenced to prison but once imprisoned

generally receive shorter terms (see Baker 2001; Castle and Barnett 2000; Loh and Ferrante 2003; Cunneen, Collins and Ralph 2005). The purpose of this paper is to explore possible reasons for these baseline sentencing differences. This will be achieved by reviewing key sentencing disparity hypotheses, broadly linking these to the international sentencing research and more specifically, to recent Australian multivariate sentencing analyses.

Sentencing Disparities Hypotheses

Three key hypotheses to explain differences by Indigenous status in baseline court data can be identified in the sentencing disparities literature: 1) differential involvement, 2) negative discrimination, 3) positive discrimination.

According to the differential involvement hypothesis, existing differences in legally relevant factors between Indigenous and non-Indigenous offenders may mediate the relationship between Indigenous status and sentence outcomes. For example, disparate sentencing decisions may simply be a response to differences in the offending behaviours of Indigenous and non-Indigenous offenders. In other words, the relationship between minority group status and sentencing may be indirect because it is acting through other legal variables differentiated by Indigenous status. Thus, there is no direct discrimination in the sentencing of Indigenous defendants because it plays little or no independent (direct) role, once other legally relevant sentencing factors are controlled (Weatherburn, Fitzgerald and Hua 2003: 1). This hypothesis predicts that Indigenous and non-Indigenous offenders will receive similar sentences under like circumstances.

The second hypothesis put forward to explain sentencing disparities is one of negative discrimination. Under the negative discrimination thesis, an offender's Indigenous status is likely, on average, to have an effect on their sentence, resulting in harsher outcomes. This argument relies on the concept of 'threat' to explain more severe outcomes for minority group offenders. Originally, researchers drew on the conflict school of criminological thought, arguing that discrimination in sentencing should be expected because minority groups are seen as constituting the greatest 'threat' to the dominant power group, and thus, the law will be more rigorously applied to them (e.g. Peterson and Hagan 1984). More recently, studies on sentencing disparity have

focused on the theoretical frameworks of ‘focal concerns’ and attributions. This perspective suggests that sentencing decisions are guided by a number of focal concerns, particularly offender blameworthiness and harm caused by the offence, community protection, and practical constraints presented by individual offenders, organisational resources, political and community expectations (Steffensmeier, Ulmer and Kramer 1998: 766-767; Johnson 2006). Offender characteristics, such as Indigenous status, may increase judicial assessments of blameworthiness or culpability, as well as judicial perceptions of increased future risk to the community. Organisational constraints may create or amplify such perceptions by pressuring judges to make decisions with limited information and time, leading to judicial reliance on ‘perceptual shorthand’ to determine sentences. This could potentially result in stereotypical attributions of increased threat and criminality being made toward minority group offenders (Steffensmeier, Ulmer and Kramer 1998; Johnson 2006).

Under the negative discrimination hypothesis, the impact of Indigenous status may be direct or interactive. A direct effect would mean that Indigenous offenders are sentenced more harshly than non-Indigenous offenders and that these differences cannot be attributed to differences in crime seriousness, prior criminal record, or other legally relevant factors (Pratt 1998). The Indigenous status of offenders may also interact with other factors to influence the sentencing decision. In other words, different sentencing determinates may be weighted differently by Indigenous status.

The final hypothesis—positive discrimination—suggests that Indigenous status might mitigate sentencing outcomes either directly or in interaction with other sentencing factors. There are at least two reasons, flowing from the focal concerns perspective, for expecting more favourable sentencing outcomes for Indigenous offenders.

First, sentencing outcomes are known to be affected by offender constraints, such as the ability to ‘do time’ (Steffensmeier, Ulmer and Kramer 1998; Johnson 2003). In comparison to the non-Indigenous population, Indigenous people tend to experience higher levels of social and economic disadvantage and associated poverty, victimisation, substance abuse and ill health, inequities with roots in the historical contexts of colonisation and governmental Indigenous policies. Potentially therefore,

Indigenous differences in offender constraints could mitigate sentence severity and lead to more lenient outcomes for them. Indigenous status may also operate over and above traditional blameworthy measures (e.g. health, victimisation) to mitigate sentencing. Indigenous offenders could be perceived as less blameworthy than their non-Indigenous counterparts because of the historical legacy of colonisation (Jeffries and Bond 2009).

Second, community and political constraints may influence judges to mitigate sentence severity for minority group offenders (Steffensmeier, Ulmer and Kramer 1998). For example, in Australia, the potential for Indigenous status to reduce sentence severity is theoretically strong. In response to the Royal Commission into Aboriginal Deaths in Custody (1991), State and Territory governments are publicly committed to reducing Indigenous over-representation. In addition, there may be a certain level of community awareness and perhaps concern about the treatment of Indigenous people. These constraints may place pressure on judges to reduce sentence severity for Indigenous defendants either directly or through interaction with other sentencing factors (Jeffries and Bond 2009).

International Research

Research on adult sentencing disparities has been dominated by North American studies. Spanning more than 40 years, the majority of these studies have explored disparities between whites and African Americans, and more recently, between whites and Latinos (Spohn 2000; Mitchell 2005). The question of Indigenous adult sentencing disparities has been somewhat neglected by international researchers. We could only locate four studies that have utilised multivariate statistical techniques to examine the impact of Indigenous status on sentencing (in the United States see, Alacerez and Bachman 1996; Munoz and McMorris 2002; Everett and Wojkiewicz 2002; in Canada, see Weinrath, 2007).

There are significant methodological problems with two of these studies. Alacerez and Bachman (1996) used a rough measure of current offence seriousness (i.e. offence type), while Munoz and McMorris (2002) omitted prior criminal history from their study. Less precise measures of offence seriousness and absence of a measure for criminal history can result in the over-estimation of direct disparity (Mitchell 2005).

Nonetheless, this body of research finds some support for the differential involvement and discrimination hypotheses (both negative and positive). The negative effect of Indigeneity on sentence severity reduced after controlling for other important sentencing variables, but direct negative impacts between Indigenous status and sentencing were still found. Indigenous defendants were more likely to be imprisoned (Mun and McMorris 2002), and once jailed, sometimes received longer terms (Alacerez and Bachman 1996; Everett and Wojkiewicz 2002). Weinrath (2007) found that while Indigenous status had no direct impact on the length of imprisonment term, it did interact with age to the benefit of some Indigenous offenders (i.e. those aged 20-29 years received shorter sentences than any other group), a finding suggestive of indirect positive discrimination.

Australian Research

Unlike international research on sentencing disparities, Australian work has been slower to develop. The use of multivariate statistical techniques to explore the impact of Indigenous status on sentencing has only recently emerged in Australia (Snowball and Weatherburn 2006, 2007; Jeffries and Bond 2009; Bond and Jeffries 2010; Bond, Jeffries and Weatherburn forthcoming; Bond, Jeffries and Loban forthcoming). However, in contrast to international research on sentencing disparities, this body of Australian work has included a wider range of sentencing determinates in the analyses, making them particularly robust.

Recent Australian research suggests that there is strong support that differential involvement explains much of the initial baseline differences between the sentencing outcomes for Indigenous and non-Indigenous offenders. Yet, there remains some evidence that differences in current offending and past criminality do not fully explain differences in all jurisdictions and types of courts.

Snowball and Weatherburn (2006, 2007) provide the first attempts in Australia to systematically investigate, using methodologically rigorous techniques, the direct impact of Indigenous status on adult sentencing. Using a sample of adult offenders (having legal representation, no past prison sentence, and not on remand for another offence) sentenced in New South Wales' courts, Snowball and Weatherburn (2006) found no significant difference between Indigenous and non-Indigenous offenders in

the likelihood of imprisonment, after controlling for a large range of factors including current and past offending, plea, age and gender. Their results suggest that Indigenous status plays little or no independent role in the sentencing process, once other relevant sentencing factors are controlled. Thus, any initial differences between Indigenous and non-Indigenous offenders in the likelihood of imprisonment can be attributable to pre-existing differences in offending and past criminal histories. Snowball and Weatherburn's (2006) research therefore supports the differential involvement hypothesis.

In their 2007 study, Snowball and Weatherburn addressed some of the limitations of their earlier sample, by including offenders previously imprisoned and who appeared without legal representation. Results were again generally supportive of the differential involvement thesis, showing that the higher rate at which Indigenous offenders in New South Wales were sent to prison could be explained in the most part by: a) the more serious and more frequent nature of their current and past offending, and b) their more frequent breach of noncustodial sanctions (Snowball and Weatherburn 2007). However, a 'residual effect of race on sentencing' was also found, suggesting that 'racial bias may influence the sentencing process even if its effects are only small' (Snowball and Weatherburn 2007: 286). Snowball and Weatherburn's more methodologically sound 2007 research therefore uncovered a small yet direct relationship between Indigenous status and sentencing. Indigenous offenders were slightly more likely than their non-Indigenous equivalents to be incarcerated. This result is suggestive of negative discrimination.

Of particular interest, Snowball and Weatherburn (2007: 286) also found that Indigenous status had a positive interactive effect with prior criminal history. With all other factors being equal, criminal history aggravated sentence severity more substantially for non-Indigenous defendants. Consistent with a focal concerns understanding of sentencing, Snowball and Weatherburn (2007: 286) speculate that perhaps, 'judicial officers, like many in the broader community, are very concerned about Indigenous overrepresentation in prison [community and political constraints]', resulting in a more positive outcomes for Indigenous offenders than similarly-situated non-Indigenous offenders.

Using higher court data (i.e. District and Supreme Courts) from Western Australia, Bond and Jeffries (2010) examined whether Indigenous women were more likely than non-Indigenous women to receive a sentence of imprisonment for comparable offending behaviour and histories over a nine year period (1996 to 2005). After controlling for age, current and past offending, baseline differences, showing that Indigenous women were more likely to be imprisoned than non-Indigenous women, reversed direction. Findings suggested that over the ten-year period, Indigenous women were on average less likely than their non-Indigenous counterparts to receive a prison sentence when being sentenced under similar circumstances to non-Indigenous females. In other words, the results suggested that there was a trend towards leniency in the sentencing of Indigenous women. The authors note, in line with the focal concerns perspective that ‘in Western Australia a degree of judicial cognisance may exist around the special circumstances of Indigenous women and that this in turn may explain why Indigenous women may be less likely than non-Indigenous women to be imprisoned’ (Bond and Jeffries 2010: 7).

Bond, Jeffries and Weatherburn (forthcoming) examined sentence length in the New South Wales higher (i.e. District and Supreme Courts) and lower courts (i.e. local courts). Results suggest that Indigenous status does not have a direct negative influence on length of imprisonment orders. Providing support for the differential involvement hypothesis, Indigenous offenders in the higher courts were not given longer sentences than non-Indigenous offenders, net of demographics, plea, current and past criminality. In the lower courts, results were suggestive of positive discrimination. Being Indigenous actually reduced the length of term imposed after adjusting for controls. Evidence of interactive effects by Indigenous status was scant. Only age differed significantly between Indigenous and non-Indigenous offenders. In this case, age had no effect on the length of sentence imposed on Indigenous defendants in the lower courts or higher courts but increased sentence length for non-Indigenous offenders at both court levels. In other words, age appeared to be interacting negatively with age for non-Indigenous offenders only.

Bond, Jeffries and Loban’s (forthcoming) analysis of Indigenous status and sentencing in Queensland’s Magistrates Courts (i.e. lower courts) found evidence to support both the negative discrimination and differential involvement hypotheses.

Initial baseline differences between Indigenous and non-Indigenous defendants in their sample suggested that the former were more likely to be imprisoned, but once sentenced to prison received shorter periods of incarceration. After controlling for demographic characteristics, plea, remand, current and past criminality, these sentencing differences by Indigenous status dissipated for the initial decision to imprison and disappeared for length of imprisonment term. Nonetheless, a direct negative relationship was still found. After controls, Indigenous offenders remained significantly more likely than non-Indigenous offenders to be sentenced to prison. This result suggests support for the negative discrimination thesis.

Like much international research, the above studies do not include important information about the context of the commission of the offences (e.g. presence of co-offenders, evidence of premeditation), other mitigating and aggravating circumstances (e.g. substance abuse, health, familial situation, employment status, past victimisation experiences) that judges may consider in making their decisions. Furthermore, remand status an especially strong predictor of sentencing was missing from the New South Wales and Western Australian studies. The inclusion of remand, contextual factors and other mitigating and aggravating variables might explain findings of negative discrimination. Further, it is possible that with a more comprehensive set of controls the mitigating effect (i.e. positive discrimination) of Indigenous status on sentencing found in some of these studies might change.

To date, Jeffries and Bond (2009) and Bond, Jeffries and Loban (forthcoming) statistical exploration of Indigenous status and sentencing in South Australia's and Queensland's higher courts (i.e. District and Supreme Courts) have included the most comprehensive set of control variables.

In South Australia, Jeffries and Bond's (2009) analysis of a matched sample of Indigenous and non-Indigenous adults sentenced in the higher courts (i.e. District and Supreme Courts), found that Indigenous offenders were less likely than their non-Indigenous defendants to be sentenced to imprisonment, independent of other factors including: demographic characteristics, current and past criminality, the context of offence commission, court process (e.g. remand), culpability factors (e.g. substance abuse). Indigenous status, in this case, appeared to have a direct yet positive effect on

sentence severity, at least for the decision to imprison. In other words, support for the positive discrimination hypothesis was found. Nonetheless, when sentence length was decided, Indigenous offenders were sanctioned more harshly than their non-Indigenous equivalents. In contrast to non-Indigenous offenders, Indigenous offenders were sentenced to longer periods of imprisonment when they appeared before the court under like circumstances. In this case, the direct relationship between Indigenous status and sentencing disadvantaged Indigenous offenders (Jeffries and Bond 2009).

Jeffries and Bond (2009) hypothesise that consistent with the focal concerns perspective, judges sentencing in South Australia could be influenced by the constraints inherent in Indigenous status itself. The significant direct yet positive impact of Indigenous status on the decision to imprison may indicate that Indigenous offenders are perceived as less blameworthy than their non-Indigenous counterparts, possibly due to Australia's legacy of colonisation, associated Indigenous social and economic marginalisation and the potential exacerbating consequences of imprisonment. Further, it is suggested that South Australian judges are influenced by political expectations of the criminal justice system post-Royal Commission and, the potential role of sentencing in reducing Indigenous over-representation (Jeffries and Bond 2009).

The opposite direction for sentence length may be an artefact of the earlier lenience at the initial sentencing stage (Jeffries and Bond 2009). Perhaps judges in South Australia felt, after giving Indigenous offenders numerous 'chances' by diverting them from custody, that retribution, incapacitation and deterrence needed to be prioritised. Again utilising a focal concerns approach, Jeffries and Bond (2009) argue that it is possible that practical constraints emanating from broader community expectations are at this sentencing stage taking precedence over the special needs of Indigenous offenders and societal expectations post Royal Commission. Populist penal sentiment has, in recent times, exerted a great deal of pressure on the courts to 'get tough' on crime, especially on more serious offences such as those being sentenced in South Australia's higher courts.

In Queensland's higher courts (i.e. District and Supreme Courts) initial baseline disparity between Indigenous and non-Indigenous defendants, showing the former were more likely to be imprisoned, reduced to parity after the introduction of controls for demographic characteristics, current and past criminality, the context of offence commission, court process (e.g. remand), culpability/blameworthiness factors (e.g. substance abuse) (Bond, Jeffries and Loban forthcoming). However, for the decision about the length of imprisonment term, Indigenous defendants received significantly shorter terms of imprisonment than non-Indigenous defendants, after adjusting for other known sentencing determinants. These results show support for the differential involvement hypothesis for the decision to imprison, but evidence for the positive discrimination hypothesis for the length of term decision.

Summary/Conclusion

This review of the research on Indigenous sentencing disparities shows that the empirical evidence is somewhat mixed. Overall, strong support for the differential involvement hypothesis is evident from the international and Australian research that has utilised multivariate statistical techniques to explore Indigenous sentencing disparities. Once crucial sentencing factors are held constant (e.g. current and past offending), sentencing outcomes for Indigenous and non-Indigenous offenders either achieve parity or the gap is reduced. In circumstances where disparity remains, more often than not, Indigenous defendants appear to be treated leniently in comparison with their non-Indigenous counterparts. Research thus provides some support for the positive discrimination hypothesis, with results showing that Indigeneity often reduces sentence severity either directly or in interaction with other sentencing factors. However, a handful of studies have found evidence of negative discrimination disadvantaging Indigenous defendants.

The contradictory nature of these findings may be explained by better measures of the circumstances of offender's offending and social background. However, the type of decision (i.e. initial decision to imprison versus length of imprisonment term), court level (i.e. lower or higher) and jurisdiction (e.g. Western Australia versus New South Wales etc) may be just as important in understanding the mixed results about the existence of Indigenous sentencing disparities.

Sentencing decisions remain an important site of research for understanding Indigenous over-representation in the criminal justice system. Indeed the continuing importance of remand and prior criminal history in predicting sentencing outcomes points to how disadvantage can be accumulated by Indigenous offenders (see also Gale and Wundersitz 1987) in a way that indirectly affects their sentencing outcomes.

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